Supreme Court, U.S.
FILED
06-86 MAY 25 2006
OFFICE OF THE CLERK

No. _____

SUPREME COURT
OF THE UNITED STATES

David Lee Smith,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

SUPPLEMENTAL APPENDIX

DAVID LEE SMITH

5800 East 6th Avenue Parkway
Denver, Colorado 80220
(303) 321-7403

PRO SE PETITIONER

INDEX

Exhibit 1 - Memorandum Opinion of the United States Tax Court filed September 11, 2003.

Exhibit 2 - Motion for Leave to File Motion to Vacate or Revise Decision filed in the United States Tax Court on September 30, 2004.

Exhibit 3 - Motion to Vacate or Revise Decision filed in the United States Tax Court on September 30, 2004.

Exhibit 4 - Opening Brief of Appellant David Lee Smith filed in the United States Court of Appeals for the Tenth Circuit on January 3, 2005.

Exhibit 5 - Petition for Rehearing and Petition for Rehearing En Banc filed in the United States Court of Appeals for the Tenth Circuit on January 20, 2006.

Exhibit 1

T.C. Memo 2003-266

UNITED STATES TAX COURT

DAVID LEE SMITH AND MARY JULIA HOOK, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 8747-00, 11725-02.

Filed September 11, 2003.

David Lee Smith and Mary Julia Hook, pro ses.

Joan E. Steele, for respondent.

MEMORANDUM OPINION

GERBER, Judge: Respondent, on May 19, 2003, moved to dismiss these consolidated cases[1] for petitioners' failure to properly prosecute and to enter income tax deficiencies and penalties (some in reduced amounts) by default against petitioners with respect to their 1992 through 1996 tax years. The trial in those cases had been scheduled for the Court's Denver.

---

[1]These cases were consolidated for purposes of trial, briefing, and opinion.

Colorado, Trial Session commencing on May 12, 2003.[2] These cases had been set for a time and date certain of May 19, 2003. On the morning of May 19, 2003, these cases were called, and petitioners failed to appear. Respondent moved to dismiss both cases for petitioners' lack of prosecution. We shall grant respondent's motion to dismiss for lack of prosecution, and decisions will be entered by default. Given the serious consequences in this action, we find it appropriate to explain the events in these cases.

In the notices of deficiency for docket Nos. 8747-00 and 11725-02, dated May 18, 2002 and April 17, 2002, respectively, respondent determined the following income tax deficiencies and additions to tax for petitioners:

---

[2]With respect to docket No. 8747-00, the May 12, 2003, setting was a continuation of a trial that had commenced during spring 2002, resumed in summer 2002, and had been delayed to enable the parties to incorporate and consolidate docket No. 11725-02, which involves subsequent tax years for the same petitioners.

Docket No.	Year	Deficiency	Additions to Tax Sec. 6651 (a) (1)/Sec. 6662	
8747-00	1992	$6,736	none	$1,347
8747-00	1993	21,167	$7,981	4,233
8747-00	1994	15,394	7,198	3,079
11725-02	1995	82,929	20,325	16,586
11725-02	1996	55,290	13,822	11,058

The following is a chronological summary of the history of these cases.

On August 15, 2000, petitioners filed a petition in docket No. 8747-00 (Case I) alleging that respondent erred in determining deficiencies in income tax and penalties for 1992, 1993, and 1994. By an April 10, 2001, notice of trial, Case I was set for trial on September 10, 2001 in Denver, Colorado.

On August 10, 2001, petitioners moved for a continuance on the grounds that petitioner Hook had learned during June 2001, that petitioner Smith (to whom petitioner Hook was married) was having an extramarital affair, and, as a result, they were living separately and not communicating. Petitioner Hook also stated, in the continuance motion, that she recognized "that continuances of trial dates are not routinely granted" and that additional time would permit

petitioners "to prepare this case and be in a position to present it to the Court."

Respondent objected to a continuance, explaining that petitioners, during the pretrial period, including the time prior to petitioner Hook's June 2001 revelation, had been uncooperative, and avoided any meetings with the Appeals officer or respondent's counsel, as required by the Court's standing pretrial order and the Court's Rules.[3] Respondent outlined a series of communications between petitioners and respondent wherein pretrial meetings were scheduled, and, in each instance rescheduled or canceled by petitioners.

Petitioners' continuance motion was set for hearing at the September 10, 2001, Trial Session, at which time respondent moved for a dismissal due to petitioners' lack of prosecution. At the hearing petitioner Hook advised the Court that, although she remained at the location described in the petition, petitioner Smith had

---

[3]All section references are to the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

moved to another State and probably did not receive service of the Court's Orders or respondent's motion to dismiss. Petitioner Smith's address was provided to the Court, and all subsequent service of papers was made to petitioners Hook and Smith at their separate addresses. Petitioners were permitted to file a written response to respondent's dismissal motion. The Court, by an order dated October 12, 2001, denied respondent's motion to dismiss and granted petitioners' continuance motion.

By a November 28, 2001, notice setting case for trial, petitioners were notified that Case I had been set for trial at the Court's Denver, Colorado, Trial Session scheduled for April 29, 2002. Six days before the scheduled April 29, 2002, Trial Session, the Court received from petitioners a document entitled "MOTION REQUESTING IMMEDIATE INFORMATION ABOUT TRIAL SETTING, AND, IF NECESSARY, MOTION REQUESTING NEW TRIAL SETTING". Said document was filed at the April 29, 2002, Trial Session as "Petitioners' Motion To Continue".

At the trial session, respondent filed a second motion to dismiss for lack of prosecution alleging that since the continuance from the September 2001 Trial Session, petitioners once

more failed to meet or meaningfully communicate with respondent, as required by the Court's Orders and Rules. Respondent's counsel established that petitioners had been notified by mail on January 9, 2002, of the need for a meeting prior to the April 29, 2002, Trial Session and a February 5, 2002, conference date was set.

On the night of February 4, 2002, petitioner Hook left a message on respondent's counsel's telephone answering machine canceling the conference. During February 2002, respondent's counsel served discovery on petitioners, but they did not respond to the discovery requests. By a March 18, 2002, letter to petitioners, respondent's counsel again invited petitioners to confer on April 9, 2002, regarding the April 29, 2002, Trial Session. In an April 8, 2002 letter, petitioner Hook advised respondent's counsel that she was not aware that Case I had been scheduled for trial on April 29, 2002.

At the April 29, 2002, Trial Session, the Court asked petitioner Hook if she was aware that her case had been scheduled for trial and she responded that when she heard about the trial setting (about 4 months before), she had written to the Court to inquire about the trial session and because she did not receive a response back from the Court, she ignored respondent's counsel's

January and March notifications of the impending April trial date.

The Court's files maintained for Case I do not reveal any such letter from petitioner. In addition, the Court's records reveal that all Court notifications, Orders, etc., had been sent by the Court to petitioners Hook and Smith at their separate addresses by certified mail, and that the notices of trial and Orders sent by the Court to the petitioners were not returned as undeliverable. Under the circumstances, the Court found petitioner Hook's explanation to be disingenuous. Accordingly, petitioners' explanation or excuses were not accepted and Case I was set for trial on May 2, 2002 at 9:00 a.m. The Court admonished petitioners that failure to appear would result in a dismissal or default of their case.

On May 2, 2002, petitioners Hook and Smith appeared and attempted, as a preliminary matter, to offer four boxes of records, each containing hundreds or perhaps thousands of documents on the ground that respondent had refused to stipulate after petitioner had proffered them on May 1, 2002, only 1 day before the trial date.

Respondent's counsel explained that she refused to blindly stipulate four boxes of materials without some explanation or understanding of the individual documents and their relevance and/or relation to the controverted expense or income items. The adjustments for petitioners' 1992, 1993, and 1994 tax years involved: Underreported gross receipts and disallowed expenses and depreciation on Schedule C (Profit or Loss From Business), income from a distribution from a retirement account for 1993, increase and decrease of reported rental income, disallowance of miscellaneous itemized deductions, self-employment tax, and additions to tax under sections 6651(a) (1) and 6662. The adjustments involved numerous individual items.

During the May 2, 2002, hearing, the Court inquired of petitioners as to the organization of the contents of the four boxes. Petitioner Smith, in response, explained that the documents were not necessarily in chronological order and that individual folders did not necessarily relate to any particular adjustment in the notice of deficiency. The Court inspected one of the numerous documents, a folder, and found that it contained a large volume of loose papers and miscellaneous documents.

It was apparent to the Court that the boxes could not be received into evidence in the state that they were being offered by petitioners. The Court required the parties to organize the records in a manner that would provide for an orderly and meaningful trial, including decisions about whether such documents were relevant and/or otherwise admissible into evidence.

The trial was recessed for 2 hours, and the parties were required to go through the individual documents and to organize them in some reasonable manner. The trial was reconvened after 2 hours, and it appeared to the Court that the parties had made a limited amount of progress in organizing the documents, so the parties were required to continue their organization of the documents and the stipulation process until July 15, 2002, at 10:00 a.m. (approximately 60 days later) when the trial would resume.

On July 15, 2002, upon resumption of trial, one of the first matters brought to the Court's attention was respondent's Motion To Dismiss For Failure To Properly Prosecute, which had been held in abeyance from the April 29 and May 2, 2002, hearings. In a July 15, 2002, supplement to his earlier motion to dismiss, respondent, after reiterating the history

up through May 2, 2002, stated that meetings with petitioners concerning the organization and stipulation of the contents of the four boxes of records had not progressed beyond the limited progress that had been made at the May 2, 2002, Court-supervised session, with the limited exception of one adjustment involving the amounts claimed for State income tax for 1992, 1993 and 1994.

Accordingly, the Court spent most of the July 15, 2002 supervising the stipulation process and receiving documents into evidence. This waste of the Court's time was precipitated by petitioners' failure to comply with the Court's Rules and Orders that they meet with respondent and propose evidence for stipulation, even though respondent had offered to meet with petitioners on several occasions.

On July 16, 2002, after examination of the first witness had begun by petitioners, it became apparent to the Court that a further exchange of documents and information was required by the parties before the witnesses could be properly examined. The Court, for the third time, recessed Case I (for approximately 30 days) until August 19, 2002. In addition, the Court provided the parties with guidance as to the material that

must be exchanged between the parties and as to the proper organization of those materials.

On August 19, 2002, the trial of Case I resumed and, after some preliminary matters, a witness was recalled to the stand. At that point, respondent moved for a continuance on the ground that a second case involving similar issues for petitioners' next 2 taxable years would soon be docketed, and it would conserve the parties' and the Court's time to try both cases together. Petitioners joined in the motion to continue on the grounds that it would provide time for the parties to further refine documentary evidence.

A continuance was granted, and the Court provided the parties with additional guidance regarding trial preparation, including an admonition to spend the time in recess to prepare the two cases for trial, including organizing documents and interviewing witnesses.

In a status report filed on November 19, 2002, respondent advised that petitioners' 1995 and 1996 tax years were now in issue (Case II) and that petitioners had been requested in writing as early as October 15, 2002. to begin the trial preparation process. The adjustments to petitioners' 1995 and 1996 tax years are

substantially the same as for those for petitioners' 1992, 1993, and 1994 tax years.[4] As of the date of respondent's report, petitioners had not contacted respondent regarding Case I or Case II.

On December 13, 2002, the Court's notice setting cases for trial on May 12, 2003, along with a standing pretrial order was issued to the parties ordering, among other matters, the parties to fully cooperate in the stipulation of facts in accord with the Court's Rules and to comply with the requirements of the Court's Rules and Orders for trial. Shortly thereafter, respondent moved to consolidate Case I and Case II, and the Court ordered petitioners to respond or object by January 31, 2003. Petitioner, in a motion filed February 10, 2003, moved for additional time to respond, and in a response dated February 19, 2003, petitioners contended that the cases should not be consolidated because they would not be able to prepare for trial by May 12, 2003. The consolidation motion was granted, and Case I

---

[4]The examination of petitioners' 1992, 1993, and 1994 tax years began during November 1995 and the examination of petitioners' 1995, and 1996 tax years began during November 1997.

and Case II were not continued from the May 12, 2003, Trial Session.

On April 9, 2003, respondent moved that the trial of the consolidated cases be set to begin on a date certain of May 19, 2003 (the second week of the scheduled calendar in Denver, Colorado), in part to accommodate nine Government employees whose testimony had been subpoenaed by petitioners. In their April 25, 2003, response to respondent's motion, petitioners requested that the case be scheduled for a date certain on or after October 1, 2003. As a reason for the extended time, petitioner Hook explained that other matters connected with her law practice had been or were being scheduled during May and through September of 2003. The trial of both cases was set by an Order, dated April 28, 2003, for a time and date certain of 10:00 a.m., May 19, 2003.

On May 16, 2003, petitioners attempted to file a motion entitled "Petitioners' Emergency Motion To Strike Trial Date and Reset Trial" in Washington, D.C., even though petitioners knew that the Court was sitting in Denver, Colorado, for a 2-week period beginning on May 12, 2003. In that Motion, it was alleged that each petitioner had been debilitated for approximately 2 weeks and that they were suffering from different

illnesses. In their untimely motion, petitioners advised that they would not appear on May 19, 2003, at the scheduled trial.

The trial Judge was not made aware of petitioners' "Emergency Motion" until immediately before the scheduled May 19, 2003, trial setting. On the morning of May 19, 2003, petitioners' cases were called, but petitioners did not appear or send anyone in their stead. Even though petitioners failed to appear, 10 witnesses (who were current and former employees of respondent) appeared pursuant to subpoenas issued by petitioners. Petitioners failed to advise the witnesses not to appear, even though petitioners knew they did not intend to appear themselves. Petitioners did not comply with the Court's Order or Rules and Procedures as fully outlined in respondent's Motion to Dismiss For Failure To Properly Prosecute, filed on the morning of May 19, 2003.

The Court took respondent's Motion under advisement and, by Order, permitted petitioners until July 3, 2003, within which to show cause why respondent's Motion should not be granted and a decision entered against petitioners. In a response to an order to show cause filed July 3, 2003, petitioners, in essence, presented the

following reasons why respondent's Motion should not be granted:

(a) Insufficient time to prepare for trial;

(b) Petitioners are lawyers and are not paid to work on their own cases;

(c) Each petitioner became ill with a different illness, and in addition, both had laryngitis and were therefore unable to speak or appear in Court;

(d) When respondent moved for a continuance the Court was disposed to grant it.

Discussion

Rule 123 of this Court's Rules of Practice and Procedure provides that the Court may, at any time, dismiss a case and enter a decision against a petitioner. As described above, petitioners have, on several occasions, not been prepared for trial, although they have been given several opportunities and almost 2 years to do so. In addition, petitioners have ignored this Court's Orders and Rules and protracted these proceedings. For the reasons stated in respondent's Motion To Dismiss For Failure To Properly Prosecute and the record and transcripts in these cases (as described in the historical summary set forth above) respondent's Motion will be granted and decisions entered for

respondent.[5]

"The sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion." Durgin v. Graham, 372 F.2d 130, 131 (5th Cir. 1967); Freedson v. Commissioner, 67 T. C. 931, 937 (1977), affd. 565 F. 2d 954 (5th Cir. 1978). Petitioners, both of whom are experienced practicing lawyers, ignored this Court's Orders and process. Further, they have failed to comply with Pretrial Orders and Court Rules requiring the preparation of their cases, including the requirement to meet and/or work with counsel for respondent to exchange documents and information, stipulate facts, and otherwise prepare for trial. In each of the numerous instances that petitioners' cases were called for trial, or trial was resumed, they failed to correct or remedy their prior failures, and little or no progress had been made from the time before, even though the Court took great

---

[5]Respondent, in his Motion for dismissal under consideration seeks the entry of decisions for deficiencies that, in some instances, are reduced in amount from the amounts determined in the notices of deficiency.

pains to detail what was expected. Petitioners have been admonished that their failure to prepare for trial and/or comply with this Court's Orders, Rules and Procedures would result in a default.

In each instance where petitioners have attempted to provide explanations of their failures to properly proceed and/or prosecute their cases, their explanations were found to be disingenuous and without foundation. For example, petitioner Hook stated that she did not believe that her case was set for trial, even though so advised by respondent on two different occasions. Petitioner Hook, a lawyer, suggested that it was sufficient that she sent a letter to the Court asking whether her case was set for trial. No such letter has been located. Moreover, none of the Court's Notices of Trial, Orders, Pretrial Orders, and related matters, that were served on and mailed to petitioners have been returned for failure of delivery. Petitioners, who are practicing lawyers, could have easily determined the status of their cases.

On December 13, 2002, petitioners' consolidated cases were scheduled for trial at the Denver, Colorado, Trial Session that commenced on May 12, 2003. Petitioners were well aware of that date, and yet they did not meet with

respondent's counsel to prepare their cases for trial. Petitioners did not advise respondent or the Court that they did not intend to appear until the eve of trial. Curiously, both petitioners claimed to have different debilitating illnesses which they alleged made them unable to appear for the longstanding trial date. We must note that petitioners alleged that the onset of their physical illnesses began more than 2 weeks prior to the trial session. It is also quite curious and hugely coincidental, that both petitioners contracted laryngitis, in addition to their debilitating illness, so they were "conveniently" unable to orally communicate with the Court.

Although petitioner Hook has filed some responses to the Court's Orders and/or respondent's inquiries of petitioners, petitioner Smith has not responded to any order, notices, or inquiries.[6]

---

[6]Respondent's counsel pointed out that petitioner Smith has been sanctioned by other courts. In particular, the Court of Appeals for the Tenth Circuit stated that

> Mr. Smith has a long history with this court marred by repetitive, frivolous filings and general abuse of the judicial

"There must come a time when even at some risk of error, a court is justified in accepting as conclusive a series of apparent subterfuges." Freedson v. Commissioner, 565 F.2d at 955 (quoting Katz v. Commissioner, 188 F. 2d 957, 959 (2d Cir. 1951), affg. a Memorandum Opinion of this Court). Petitioners have had numerous opportunities to present the merits of their cases. At this juncture, after three false starts and a total of five separate opportunities to present the merits of their claims, petitioners have not meaningfully done

---

> process. This well-documented course of misconduct began during his tenure as a practicing attorney, prompting the imposition of numerous monetary sanctions, his suspension from Tenth Circuit practice, and ultimately his disbarment by this court. * * *

Howard v. Mail-Well Envelope Co., 150 F.3d 1227, 1231 (10th Cir. 1998). The Court of Appeals also noted that Mr. Smith had been disbarred by the U.S. Supreme Court. See In re Disbarment of Smith, 516 U.S. 984 (1995).

so. The taxable years in question are 1992 through 1996, and these cases have been pending and/or docketed for a sufficient amount of time for petitioners to have prepared and presented the merits of their cases.

Although petitioners alleged that the period for assessment of any deficiency expired, respondent has shown that at the time the notices of deficiency were mailed, the period for assessment remained open due to extensions of the assessment period agreed to by the parties. In particular, respondent provided the Court with copies of petitioners' income tax returns which reflect the filing dates and copies of agreements extending the periods for assessment to a time beyond the date the notice of deficiency was filed.

Respondent has also shown that he does not bear the burden of proof, burden of going forward with evidence, or burden of production on any other matter in issue. In that regard, the examination of petitioners' 1992, 1993, and 1994 tax years began November 1995 and the examination of petitioners' 1995 and 1996 tax years began November 1997. Section 7491 applies to cases in which the examination commenced after July 22, 1998. Accordingly, that section does not apply to the taxable years

before the Court. In their response to respondent's motion to dismiss and this Court's Order to Show Cause, petitioners offer little to refute respondent's allegations.

Respondent's frustration with petitioners is longstanding, and several motions for dismissal have been filed, the first of which was during October 2001. Petitioners subpoenaed at least 10 witnesses, all of whom appeared on the specific trial date of May 19, 2003. These same witnesses also had been required to appear on two different occasions during summer 2002. Petitioners did nothing to notify the witnesses not to appear. At some point during this extended process, petitioners must accord these proceedings some priority over their other affairs or risk dismissal. Montgomery v. Commissioner 367 F. 2d 917 (9th Cir. 1966).

Accordingly,

Respondent's Motion To Dismiss for Failure To Properly Prosecute in Docket Nos. 8747-00 and 11725-02 will be granted, and decisions entered for respondent.

Exhibit 2

UNITED STATES TAX COURT

Washington, D.C.

DAVID LEE SMITH &
MARY JULIA HOOK,

Petitioners,

v. Docket No. 8747-00

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

MOTION FOR LEAVE TO FILE MOTION
TO VACATE OR REVISE DECISION

COMES NOW the petitioner, David Lee Smith, and moves the Court for leave to file the attached Motion to Vacate or Revise Decision, and, as grounds therefor, states as follows:

1. On September 11, 2003, United States Tax Court Judge Joel Gerber filed his Memorandum Opinion granting respondent's motion to dismiss this

case[1] for petitioners' alleged failure to properly prosecute and to enter income tax deficiencies and penalties by default against petitioners with respect to their 1992 through 1996 tax years.

2. Rule 162 of the Rules of Practice & Procedure of the United States Tax Court provides as follows:

> Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit.

3. In the present case, petitioner Mary Julia Hook's appeal of Judge Gerber's September 11, 2003 decision was denied by the United States Court of Appeals for the Tenth Circuit on July 13, 2004; her petition for rehearing and for rehearing *en banc* was denied on September 10, 2004. Petitioner Smith was deprived of his constitutional and statutory rights to join in petitioner Hook's appeal or to file a separate appeal because of the Tenth Circuit's order in Howard v. Mail-Well Envelope Co., 150 F.3d 1227 (10th Cir.

---

[1]This case was consolidated with Docket No. 11725-02, which was also dismissed by Judge Gerber's September 11, 2003 Memorandum Opinion.

1998), which Judge Gerber cited in his September 11, 2003 decision (*see* footnote 6 thereto). This order prohibits Smith from filing a *pro se* appeal to the Tenth Circuit without first obtaining permission from that Court, permission which that Court has repeatedly refused to grant.

4. Under these circumstances, good cause exists for permitting petitioner Smith to file his Motion to Vacate or Revise Decision beyond the 30-day period mentioned in Rule 162 of the Rules of Practice & Procedure of the United States Tax Court. *See also* Fed. R. Civ. P. 60(b), which provides that "[t]he motion [to vacate] shall be made within a reasonable time. . . ." It was clearly reasonable for petitioner Smith to defer filing his Motion to Vacate or Revise Decision pending a decision on petitioner Hook's appeal to the Tenth Circuit.

WHEREFORE, petitioner Smith requests an order permitting him to file the attached Motion to Vacate or Revise Decision beyond the 30-day period mentioned in Rule 162 of the Rules of Practice & Procedure of the United States Tax Court.

Dated this 30th day of September, 2004.

Respectfully submitted,

David Lee Smith
Pro Se Petitioner
5800 East Sixth Avenue Parkway
Denver, Colorado 80220
(303) 321-7403
(303) 321-0598 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2004, a true and correct copy of the foregoing Motion for Leave to File Motion to Vacate or Revise Decision, with attached Motion to Vacate or Revise Decision, was placed in the United States mail, first class postage prepaid, addressed as follows:

Joan E. Steele, Attorney
Internal Revenue Service
Office of Chief Counsel
1244 Speer Blvd., #500
Denver, Colorado 80204-3583

Exhibit 3

UNITED STATES TAX COURT

Washington, D.C.

DAVID LEE SMITH &
MARY JULIA HOOK,

Petitioners,

v. Docket No. 8747-00

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

MOTION TO VACATE OR REVISE DECISION

COMES NOW the petitioner, David Lee Smith, and moves the Court to vacate or revise the decision entered on September 11, 2003, and as grounds therefor, states as follows:

1. On September 11, 2003, United States Tax Court Judge Joel Gerber filed his Memorandum Opinion granting respondent's motion to dismiss this

case[1] for petitioners' alleged failure to properly prosecute and to enter income tax deficiencies and penalties by default against petitioners with respect to their 1992 through 1996 tax years.

2. Before granting respondent's motion to dismiss, Judge Gerber ordered petitioners to show cause why respondent's motion to dismiss should not be granted and a decision be entered against petitioners. However, no hearing was held at which petitioners were given the opportunity to present evidence on their numerous defenses and arguments to the false and defamatory charges being brought against them by respondent.

3. Petitioners' defenses and arguments were fact intensive, requiring the presentation of extensive documentary and testimonial evidence. These defenses and arguments could not be adequately presented in petitioners' written response to Judge Gerber's order to show cause. Judge Gerber was not in a position to make findings of fact and conclusions of law without hearing the evidence.

4. In the absence of an evidentiary hearing,

---

[1]This case was consolidated with Docket No. 11725-02, which was also dismissed by Judge Gerber's September 11, 2003 Memorandum Opinion.

petitioners were deprived of their right to due process of law under the Fifth Amendment to the Constitution of the United States, as well as their right to the equal protection of the laws incorporated into that provision. No similarly situated litigants have had their cases dismissed without being given an evidentiary hearing on their defenses and arguments to the charges being brought against them.

5. Respondent's charges against petitioners were false and defamatory, and constituted a fraud on petitioners and the Court.

6. For these reasons, Judge Gerber's September 11, 2003 decision should be declared void *ab initio* and vacated. Alternatively, this decision should be revised to give petitioners an evidentiary hearing on their defenses and arguments to the false and defamatory charges being brought against them by respondent.

WHEREFORE, petitioner Smith requests an order declaring void *ab initio* and vacating Judge Gerber's September 11, 2003 decision. Alternatively, this decision should be revised to give petitioners an evidentiary hearing on their defenses and arguments to the false and defamatory charges being brought against them by respondent.

REQUEST FOR ORAL ARGUMENT

Petitioner hereby requests oral argument on his Motion to Vacate or Revise Decision.

Dated this 30th day of September, 2004.

Respectfully submitted,

David Lee Smith
Pro Se Petitioner
5800 East Sixth Avenue Parkway
Denver, Colorado 80220
(303) 321-7403
(303) 321-0598 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2004, a true and correct copy of the foregoing Motion to Vacate or Revise Decision was placed in the United States mail, first class postage prepaid, addressed as follows:

Joan E. Steele, Attorney
Internal Revenue Service
Office of Chief Counsel
1244 Speer Blvd., #500
Denver, Colorado 80204-3583

_____

Exhibit 4

NOS. 04-9009 AND 04-9010

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID LEE SMITH,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Appeal from the United States Tax Court
United States Tax Court Judge Joel Gerber

OPENING BRIEF OF APPELLANT DAVID LEE SMITH

ORAL ARGUMENT IS REQUESTED

M. JULIA HOOK

5800 East Sixth Avenue Parkway
Denver, Colorado 80220
303-321-7403

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

I. JURISDICTIONAL STATEMENT 1

II. STATEMENT OF THE ISSUES PRESENTED. 2

III. STATEMENT OF THE CASE 2

IV. STATEMENT OF FACTS 2

V. SUMMARY OF THE ARGUMENT 7

VI. ARGUMENT 8

A. JUDGE GERBER COMMITTED REVERSIBLE ERROR AND/OR ABUSED HIS DISCRETION BY SUMMARILY DISMISSING MR. SMITH'S OCTOBER 1, 2004 MOTIONS FOR LEAVE TO FILE MOTION TO VACATE OR REVISE DECISION AND HIS MOTIONS TO VACATE OR REVISE DECISION 8

B. JUDGE GERBER COMMITTED REVERSIBLE ERROR AND/OR ABUSED HIS DISCRETION AND VIOLATED MR. SMITH'S AND HIS WIFE'S FIRST AND FIFTH AMENDMENT RIGHTS BY ISSUING HIS SEPTEMBER 16, 2003 ORDER AND HIS SEPTEMBER 11, 2003 MEMORANDUM OPINION GRANTING THE COMMISSIONER'S MOTION TO DISMISS, AND SUMMARILY DISMISSING MR. SMITH'S AND HIS WIFE'S CONSOLIDATED TAX CASE WITHOUT FIRST AFFORDING THEM AN EVIDENTIARY HEARING. 12

VII. CONCLUSION 16

VIII. REQUEST FOR ORAL ARGUMENT 17

CERTIFICATE OF SERVICE . . . . . Attached

ATTACHMENTS PER 10TH CIRCUIT RULE 28.2. . . . . Attached

TABLE OF AUTHORITIES

CASES:

Davis v. Operation Amigo, Inc.,
378 F.2d 101 (10th Cir. 1967). 12

Durgin v. Commissioner,
372 F.2d 130 (5th Cir. 1967) 13

Freedson v. Commissioner, 67 T.C. 931 (1977),
aff'd 565 F.2d 954 (5th Cir. 1978) 13, 14

Howard v. Mail-Well Envelope Co.,
150 F.3d 1227 (10th Cir. 1998) 6, 10, 11

Meeker v. Rizley,
324 F.2d 269 (10th Cir. 1963). 12, 13

Sandee Mfg. Co. v. Rohm and Haas Co.,
298 F.2d 41 (7th Cir. 1962) 12

Wojton v. Marks,
344 F.2d 222 (7th Cir. 1965) 12

STATUTE:

26 U.S.C. § 7482 1

OTHER AUTHORITIES:

Amend. 1, U.S. Consti.. . . . . 2, 9, 12, 13, 15

Amend. 5, U.S. Consti. 2, 9, 12, 13, 15

Fed R. App. P. 13. 1

Fed. R. Civ. P. 60(b). 11

Rule 162 of the Rules of Practice &
Procedure of the United States Tax Court 10, 11

ABA Code of Judicial Conduct,
Canon 2(A) 11, 15

ABA Code of Judicial Conduct,
Canon 3(A)(4). 11, 15

ABA Code of Judicial Conduct,
Canon 3(B). 11, 15

ABA Code of Judicial Conduct,
Canon 3© 11, 15

I. JURISDICTIONAL STATEMENT

By virtue of 26 U.S.C. § 7482 and Fed. R. App. P. 13, the United States Court of Appeals for the Tenth Circuit has jurisdiction to hear this appeal, and to review the following orders issued by United States Tax Court Judge Joel Gerber: (1) Judge Gerber's October 7, 2004 orders denying Mr. Smith's Motions for Leave to File Motion to Vacate or Revise Decision and his Motions to Vacate or Revise Decision (Rec. on App. Docket No. 8747-00, Docs. 90 and 90A/Rec. on App. Docket No. 11725-02, Docs. 32 and 32A); and (2) Judge Gerber's September 16, 2003 final order (and his September 11, 2003 memorandum opinion) dismissing Mr. Smith's and his wife's consolidated tax case (Rec. on App. Docket No. 8747-00, Docs. 83 and 82/Rec. on App. Docket No. 11725-02, Docs. 25 and 24). On October 20, 2004, Mr. Smith timely filed with the United States Tax Court the Notices of Appeal in Tenth Circuit Docket Nos. 04-9009 and 04-9010. (Rec. on App. Docket No. 8747-00, Doc. 91/Rec. on App. Docket No. 11725-02, Doc. 33.) The records on appeal in both dockets were filed with this Court on November 22, 2004.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether Judge Gerber committed reversible error and/or abused his discretion by issuing his October 7, 2004 orders summarily denying Mr. Smith's Motions for Leave to File Motion to Vacate or Revise Decision and his Motions to Vacate or Revise Decision.

B. Whether Judge Gerber committed reversible error and/or abused his discretion and violated Mr. Smith's and his wife's First and Fifth Amendment rights by issuing his September 16, 2003 order and his September 11, 2003 memorandum opinion granting the Commissioner's motion to dismiss Mr. Smith's and his wife's consolidated tax case, and summarily dismissing the consolidated case without first affording them an evidentiary hearing.

III. STATEMENT OF THE CASE

Mr. Smith incorporates the Statement of Facts set forth in Paragraph IV, below, as his Statement of the Case in this appeal.

IV. STATEMENT OF FACTS

On May 18, 2000, the Commissioner issued a notice of deficiency to Appellant David Lee Smith and his wife assessing tax deficiencies for the calendar years 1993, 1994 and 1995. On August 15, 2000, Mr. Smith and his wife timely filed a petition with the United States Tax Court requesting a redetermination of the notice of deficiency. (Rec. on App. Docket No. 8747-00, Doc. 1.) This appeal was assigned Tax Court Docket No. 8747-00. (Id.)

In mid-April, 2002, the Commissioner issued a second notice of deficiency to Mr. Smith and his wife assessing tax deficiencies for the calendar years 1995 and 1996. On July 15, 2002, Mr. Smith and his wife timely filed a petition with the United States Tax Court requesting a redetermination of this notice of deficiency. (Rec. on App. Docket No. 11725-02, Doc. 1.) This second appeal was assigned Tax Court Docket No. 11725-02. (Id.)

Granting the Commissioner's motion to consolidate, on March 4, 2003, Judge Gerber issued his

order consolidating Docket Nos. 8747-00 and 11725-02; but he denied Mr. Smith's and his wife's motion for a trial date that afforded them a reasonable opportunity to prepare their case in Docket No. 11725-02 for trial. (Rec. on App. Docket No. 8747-00, Doc. 68/Rec. on App. Docket No. 11725-02, Doc. 10.) Again granting the Commissioner's motion and over the objections of Mr. Smith and his wife, on April 28, 2003 Judge Gerber issued an order re-setting the consolidated case for a 10-day trial starting on May 19, 2003 (rather than on May 12, 2003 as previously set). (Rec. on App. Docket No. 8747-00, Doc. 72/Rec. on App. Docket No. 11725-02, Doc. 14.)

Because both Mr. Smith and his wife were seriously ill and did not believe that they would be physically able to appear in court on May 19, 2003 -- let alone attempt to try a case -- on May 16, 2003, Mr. Smith and his wife filed an emergency motion, requesting that Judge Gerber strike the May 19, 2003 trial date and reschedule the consolidated case for trial at a later date. (Rec. on App. Docket No. 8747-00, Doc. 75/Rec. on App. Docket No. 11725-02, Doc. 17.) Taking advantage of a difficult personal situation for Mr. Smith and his wife, the Commissioner then filed a motion to dismiss for failure to properly prosecute alleging that the case should be dismissed for Mr. Smith's and his wife's alleged "lack of cooperation." (Rec. on App. Docket No. 8747-00, Doc. 76/Rec. on App. Docket No. 11725-02, Doc. 18.) Because Mr.

Smith and his wife were unable to appear for trial on May 19, 2003, on that date Judge Gerber issued a show cause order to which Mr. Smith and his wife responded on July 3, 2003. (Rec. on App. Docket No. 8747-00, Docs. 77 and 81/Rec. on App. Docket No. 11725-02, Docs. 19 and 23.) However, Judge Gerber did not grant Mr. Smith and his wife a hearing at which they would have been able to present evidence on their numerous defenses and arguments to the false and defamatory charges being brought against them by the Commissioner.

Nevertheless, on September 11, 2003, Judge Gerber issued his memorandum opinion stating his reasons for dismissing Mr. Smith's and his wife's consolidated case (and therefore Mr. Smith's and his wife's two tax appeals), and on September 16, 2003 Judge Gerber entered the order dismissing Mr. Smith's and his wife's consolidated case and entering income tax deficiencies and penalties by default against them with respect to their 1992 through 1996 tax years. (Rec. on App. Docket No. 8747-00, Docs. 82 and 83/Rec. on App. Docket No. 1725-02, Docs. 24 and 25.) The total income tax deficiencies, penalties and interest assessed or collected by default in the consolidated case was $438,000.00 plus interest. (Id.)

On December 15, 2003, Mr. Smith's wife timely filed her notice of appeal of Judge Gerber's September 16, 2003 order and his September 11, 2003

memorandum opinion, as well as those orders Judge Gerber issued on March 4, 2003, April 28, 2003 and September 11, 2003. (Rec. on App. Docket No. 8747-00, Doc.84/Rec. on App. Docket No. 11725-02, Doc. 26.) However, Mr. Smith was deprived of his constitutional and statutory rights to join in his wife's appeal or to file a separate appeal because of the Tenth Circuit's order in *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998), an order of which Judge Gerber was well aware as he cited it in the sixth footnote to his September 11, 2003 decision. (Rec. on App. Docket No. 8747-00, Doc. 82/Rec. on App. Docket No. 11725-02, Doc. 24.)

On July 13, 2004, a three-judge hearing panel of the United States Court of Appeals for the Tenth Circuit issued its order and judgment in Mr. Smith's wife's appeal, affirming the September 11, 2003 memorandum opinion and the September 16, 2003 order of the Tax Court dismissing Mr. Smith's wife's (and Mr. Smith's) consolidated tax case. On September 10, 2004, a three-judge hearing panel of the United States Court of Appeals for the Tenth Circuit issued its order denying Mr. Smith's wife's petition for rehearing *en banc*.

On October 1, 2004, Mr. Smith filed with the Tax Court in *each* of Docket Nos. 8747-00 and 11725-02, his Motion for Leave to File Motion to Vacate or Revise Decision, along with his Motion to Vacate or

Revise Decision in each docket. Judge Gerber summarily denied Mr. Smith's motions on October 7, 2004, and Mr. Smith filed his notices of appeal in both dockets on October 20, 2004. (Rec. on App. Docket No. 8747-00, Docs. 90, 90A and 91/Rec. on App. Docket No. 11725-02, Docs. 32, 32A and 33.) The records on appeal in both dockets were filed with the United States Court of Appeals for the Tenth Circuit on November 22, 2004.

V. SUMMARY OF THE ARGUMENT

A. Judge Gerber erred and committed reversible error and/or abused his discretion by issuing his October 7, 2004 orders summarily denying Mr. Smith's Motions for Leave to File Motion to Vacate or Revise Decision and his Motions to Vacate or Revise Decision. By his actions, Judge Gerber also clearly demonstrated his bias against Mr. Smith.

B. Judge Gerber erred and committed reversible error and/or abused his discretion by issuing his September 16, 2003 order and his September 11, 2003 memorandum opinion granting the Commissioner's motion to dismiss and summarily dismissing Mr. Smith's and his wife's consolidated tax cases without affording them an evidentiary hearing. By his actions, Judge Gerber also clearly demonstrated his bias against Mr. Smith and his wife.

VI. ARGUMENT

A. JUDGE GERBER COMMITTED REVERSIBLE ERROR AND/OR ABUSED HIS DISCRETION BY SUMMARILY DISMISSING MR. SMITH'S OCTOBER 1, 2004 MOTIONS FOR LEAVE TO FILE MOTION TO VACATE OR REVISE DECISION AND HIS MOTIONS TO VACATE OR REVISE DECISION.

Before granting the Commissioner's motion to dismiss in consolidated Tax Court Docket Nos. 8747-00 and 11725-02, Judge Gerber issued his May 19, 2003 order permitting Mr. Smith and his wife to show cause why the Commissioner's motion to dismiss should not be granted and a decision be entered against Mr. Smith and his wife. (Rec. on App. Docket No. 8747-00, Doc. 77/Rec. on App. Docket No. 11725-02, Doc. 19.) However, no hearing was held at which Mr. Smith and his wife were afforded the opportunity to present evidence on their numerous defenses and arguments to the false and defamatory charges being brought against them by the Commissioner. (Rec. on App. Docket No. 8747-00, Doc. 76/Rec. on App. Docket No. 11725-02, Docs. 18.) As Mr. Smith's and his wife's defenses and arguments were fact intensive, requiring the presentation of extensive documentary and testimonial evidence, including expert testimony, these defenses and arguments could not be adequately presented in Mr. Smith's and his wife's written

response to Judge Gerber's order to show cause. (Rec. on App. Docket No. 8747-00, Doc. 81/Rec. on App. Docket No. 11725-02, Doc. 23.) Judge Gerber was not in a position to make findings of fact and conclusions of law without first having heard all of the evidence.

In the absence of an evidentiary hearing, Mr. Smith and his wife were deprived of their right to due process of law under the Fifth Amendment to the Constitution of the United States, as well as their right to the equal protection of the laws incorporated into that provision. They were also deprived of their First Amendment rights to petition the government for a redress of grievances and/or to access to the courts. No similarly situated litigants have had their cases dismissed without being given an evidentiary hearing on their defenses and arguments to the charges being brought against them by the Commissioner. For these reasons, in response to Mr. Smith's October 1, 2004 motions, Judge Gerber should have declared his September 11, 2003 decision void *ab initio* and vacated it; or, at the very least, he should have revised his September 11, 2003 decision to give Mr. Smith and his wife an evidentiary hearing on their defenses and arguments to the false and defamatory charges brought against them by the Commissioner.

Rule 162 of the Rules of Practice & Procedure of the United States Tax Court provides that:

> Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit.

In the present case, Mr. Smith's wife's appeal of Judge Gerber's September 11, 2003 decision was denied by the United States Court of Appeals for the Tenth Circuit on July 13, 2004; her petition for rehearing and for rehearing *en banc* was denied on September 10, 2004. As this Court is aware, Appellant David Lee Smith was precluded from joining in his wife's appeal or from filing a separate appeal (and was thereby deprived of his constitutional and statutory rights) because of this Court's order in *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998), an order of which Judge Gerber was well aware as he cited it in footnote 6 to his September 11, 2003 decision. This order prohibits Mr. Smith from filing a *pro se* appeal to the Tenth Circuit without first obtaining permission from that Court, permission that this Court has repeatedly refused to grant to him. Under these circumstances, good cause existed for Judge Gerber to permit Mr. Smith to file his Motions to Vacate or Revise Decision beyond the 30-day period required by Rule 162 of the Rules of Practice & Procedure of the United States Tax Court. *See also* Fed. R. Civ. P. 60(b), which provides that "[t]he motion [to vacate]

shall be made within a *reasonable* time. . . ." [Emphasis added.]

Under all of the circumstances, it was clearly reasonable for Mr. Smith to defer filing his Motions to Vacate or Revise Decision pending a decision on his wife's appeal to the Tenth Circuit; and he filed his Motions to Vacate or Revise Decision within 21 days of the time that the Tenth Circuit issued its order denying Mr. Smith's wife's petition for rehearing *en banc* in her appeal. By summarily denying Mr. Smith's Motions for Leave to File Motion to Vacate or Revise Decision and his Motions to Vacate or Revise Decision, Judge Gerber acted arbitrarily and committed reversible error and/or abused his discretion. *See Davis v. Operation Amigo, Inc.*, 378 F.2d 101 (10th Cir. 1967); *Wojton v. Marks*, 344 F.2d 222 (7th Cir. 1965); *Meeker v. Rizley*, 324 F.2d 269 (10th Cir. 1963); *Sandee Mfg. Co. v. Rohm and Haas Co.*, 298 F.2d 41 (7th Cir. 1962).

B. JUDGE GERBER COMMITTED REVERSIBLE ERROR AND/OR ABUSED HIS DISCRETION AND VIOLATED MR. SMITH'S AND HIS WIFE'S FIRST AND FIFTH AMENDMENT RIGHTS BY ISSUING HIS SEPTEMBER 16, 2003 ORDER AND HIS SEPTEMBER 11, 2003 MEMORANDUM OPINION GRANTING THE COMMISSIONER'S MOTION TO DISMISS, AND SUMMARILY DISMISSING MR. SMITH'S AND HIS WIFE'S CONSOLIDATED TAX CASE WITHOUT FIRST AFFORDING THEM AN EVIDENTIARY HEARING.

Judge Gerber issued his decision in Mr. Smith's and his wife's consolidated tax case in Docket Nos. 8747-00 and 11725-02 and imposed more than $438,00.00 in allegedly underpaid taxes, penalties and interest on them without first affording them the opportunity for an evidentiary hearing in violation of their Fifth Amendment rights to due process and equal protection of the laws and their First Amendment rights to petition the government for a redress of grievances and/or to access to the courts. (Rec. on App. Docket No. 8747-00, Docs. 82 and 83/Rec. on App. Docket No. 1725-02, Docs. 24 and 25.)

The statement of "facts" contained in Judge Gerber's September 11, 2003 memorandum opinion on which he based his decision to dismiss Mr. Smith's and his wife's consolidated tax case and impose more than $438,00.00 in allegedly underpaid taxes, penalties and

interest on them can best be described as a collection of false statements, half truths, and calculated omissions, most of which were drawn directly from the Commissioner's motion to dismiss Mr. Smith's and his wife's consolidated tax case. (Rec. on App. Docket No. 8747-00, Doc. 82/Rec. on App. Docket No. 1725-02, Doc. 24.)

Before granting the Commissioner's motion to dismiss Mr. Smith's and his wife's consolidated tax case, Judge Gerber issued an order permitting them to show cause why the motion to dismiss should not be granted and a decision be entered against them. (Rec. on App. Docket No. 8747-00, Doc. 77/Rec. on App. Docket No. 1725-02, Doc. 19.) However, no hearing was held at which Mr. Smith and his wife were given the opportunity to present evidence on their numerous defenses against and arguments to the false and defamatory allegations and charges being brought against them by the Commissioner in his motion to dismiss, allegations and charges that were false and defamatory, and actually constituted fraud, misrepresentation, or other misconduct of an adverse party. (Rec. on App. Docket No. 8747-00, Doc. 76/Rec. on App. Docket No. 1725-02, Doc. 18.)

Mr. Smith's and his wife's defenses and arguments were fact intensive, requiring the presentation of extensive documentary and testimonial evidence, including expert testimony. These defenses

and arguments could not be adequately presented in their written response to Judge Gerber's order to show cause no matter how hard Mr. Smith and his wife tried. (Rec. on App. Docket No. 8747-00, Doc. 81/Rec. on App. Docket No. 1725-02, Doc. 23.) Without first hearing the evidence, Judge Gerber was not in a position to make findings of fact and conclusions of law. As a result, the findings of fact and conclusions of law made by Judge Gerber in the September 11, 2003 memorandum opinion were based on false and misleading information, and, therefore, were false, inaccurate and unwarranted. (Rec. on App. Docket No. 8747-00, Doc. 82/Rec. on App. Docket No. 1725-02, Doc. 24.)

In the absence of an evidentiary hearing, Mr. Smith and his wife were deprived of their right to due process of law under the Fifth Amendment to the Constitution of the United States and their right to the equal protection of the laws incorporated into that provision as well as their First Amendment rights to petition the government for a redress of grievances and/or to access to the courts.

No similarly situated federal tax litigants have had their cases dismissed and a default judgment entered against them without being given an evidentiary hearing where they could offer documentary and testimonial evidence (including expert testimony) in support of their defenses against

and arguments to the allegations and charges being made by the Commissioner of Internal Revenue.

VII. CONCLUSION

Mr. Smith requests that this Court reverse Judge Gerber's October 7, 2004 orders denying Mr. Smith's Motions for Leave to File Motion to Vacate or Revise Decision and his Motions to Vacate or Revise Decision, and direct Judge Gerber to vacate his September 11, 2003 memorandum opinion and his September 16, 2003 order dismissing the consolidated tax case and set the consolidated case for trial.

In the alternative, Mr. Smith requests that this Court reverse and declare void *ab initio* Judge Gerber's September 16, 2003 order dismissing the consolidated tax case and his September 11, 2003 memorandum opinion and remand the consolidated case to the Tax Court for trial.

In the alternative, Mr. Smith requests that this Court reverse Judge Gerber's October 7, 2004 orders denying Mr. Smith's Motions for Leave to File Motion to Vacate or Revise Decision and his Motions to Vacate or Revise Decision, and direct Judge Gerber to vacate his September 11, 2003 memorandum opinion and his September 16, 2003 order dismissing the consolidated tax case and provide Mr. Smith and his wife with a full evidentiary hearing prior to acting on

the Commissioner's May 19, 2003 motion to dismiss.

Mr. Smith also requests such other and further relief as may be just under the circumstances.

VIII. REQUEST FOR ORAL ARGUMENT

Oral argument is hereby requested to address the important issues of first impression raised by this appeal.

DATED this 3rd day of January, 2005.

Respectfully submitted,

M. JULIA HOOK

5800 East Sixth Avenue Parkway
Denver, Colorado 80220
303-321-7403
mjhook@comcast.net

ATTORNEY FOR APPELLANT
DAVID LEE SMITH

Exhibit 5

NO. 04-9009 & 04-9010

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID LEE SMITH,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Appeal from the United States Tax Court
United States Tax Court Judge Joel Gerber

APPELLANT DAVID LEE SMITH'S PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

In accordance with Fed. R. App. P. 35 and 40, the appellant, David Lee Smith, hereby files his Petition for Panel Rehearing and Petition for Rehearing

En Banc, and as grounds therefor, states as follows:

I.
PRELIMINARY STATEMENT OF EN BANC JURISDICTION

The proceeding involves one or more questions of exceptional importance: (A) whether the panel decision conflicts with a decision of the United States Supreme Court; (B) whether the panel decision conflicts with a decision of the United States Court of Appeals for the Tenth Circuit and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; © whether the panel decision conflicts with the authoritative decisions of other United States Courts of Appeal that have addressed the issue; (D) whether the panel decision conflicts with the constitution, statutes and other laws of the United States; and/or (E) whether the panel decision conflicts with the Code of Judicial Conduct and other ethical standards applicable to judges of the United States Courts of Appeal. Citations to conflicting decisions and authorities are set forth in the following sections.

II.
PANEL DECISION DENYING SMITH'S MOTION TO RECUSE AND/OR DISQUALIFY THE TENTH CIRCUIT FROM THIS APPEAL

On December 6, 2005, a panel composed of Lucero, Porfilio, and Anderson, Circuit Judges, issued its Order and Judgment (unpublished) denying Smith's motion and supplemental motion to recuse and/or disqualify the United States Court of Appeals for the Tenth Circuit from this appeal,[1] citing *Switzer v. Berry*,

---

[1]The panel's Order and Judgment was authored by Tenth Circuit Judge John C. Porfilio, who previously participated in several Tenth Circuit decisions imposing harsh and unjustified sanctions against Smith without due process of law. *See, e.g., Casillan v. Regional Transportation District,* 986 F.2d 1426 (10th Cir. 1993) [*sua sponte* imposition of monetary sanctions against Smith] and *Howard v. Mail-Well Envelope Co.,* 150 F.3d 1227 (10th Cir. 1998) (*en banc*) [*sua sponte* imposition of prospective filing restrictions against Smith, and citing other cases in which the Tenth Circuit has imposed harsh and unjustified sanctions against Smith without due process of law, including *In re David L. Smith*, 76 F.3d 335 (10th Cir. 1996) (ordering disbarment from the practice of law in the Tenth Circuit) and *In re David L. Smith*, 10 F.3d 723

198 F.3d 1255 (10th Cir. 2000). However, the Tenth Circuit's decision in *Switzer* conflicts with 28 U.S.C. § 455(a),[2] Canon 3 of the Code of Judicial Conduct,[3]

(10th Cir. 1993) (ordering indefinite suspension from the practice of law in the Tenth Circuit)].

Tenth Circuit Judges Stephen H. Anderson and Carlos F. Lucero also participated in the decision in *Howard, supra*, as well as other Tenth Circuit decisions against Smith. In addition, Tenth Circuit Judge Anderson was employed as a Trial Attorney in the Tax Division of the United States Department of Justice from 1960-1964, creating the appearance of impropriety in this case in which the Commissioner of Internal Revenue is represented by attorneys employed by the Tax Division of the United States Department of Justice.

[2]28 U.S.C. § 455(a) provides as follows: "Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

[3]Canon 3 of the Code of Judicial Conduct provides as follows [at 3(C)(1)]: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which (a) the judge has personal bias or prejudice

and the Due Process Clause of the Fifth Amendment to the Constitution of the United States, all of which entitle a litigant to a fair and impartial decision-maker. *See Cheney v. U.S. District Court for the District of Columbia,* 541 U.S. 913, 917 (2004) ("Let me respond at the outset, to Sierra Club's suggestion that I should 'resolve any doubts in favor of recusal.' That might be sound advice if I were sitting on a Court of Appeals."); *Microsoft Corp. v. United States et al.*, 530 U.S. 1301, 1303 (2000), citing *Liteky v. United States*, 510 U.S. 540, 548 (1994), and *In re Drexel Burnham Lambert, Inc.* 861 F 2d. 1307, 1309 (2nd Cir. 1988); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988) (stating that § 455(a) requires judicial recusal if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge of his interest or bias in the case). *See also, United States v. Chantal*, 902 F. 2d 1018, 1023 (1st Cir.1990) (stating that the language of §455(a) is automatic, mandatory and self-executing; that §455(a) eliminated the "duty to sit doctrine"; and that §455(a) attacks "the appearance of bias, not just bias in fact").

In his motion and supplemental motion to recuse and/or disqualify the United States Court of Appeals for the Tenth Circuit from this appeal, Smith called attention to the Tenth Circuit's long history of

---

concerning a party, ..."

imposing harsh and unjustified sanctions against him without due process of law.[4] Smith also called attention to his currently pending appeal in the Tenth Circuit of a judgment by the United States District Court for the District of Colorado (Judge Richard P. Matsch) dismissing his lawsuit alleging a conspiracy by several Tenth Circuit judges and others to deprive Smith of his civil rights under 42 U.S.C. §§ 1985(3), 1986, and 1983, and the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.[5]

---

[4]*See* footnote 1, *supra.* Clearly, the panel was aware of this long history when it issued its Order and Judgment citing many of the cases cited in footnote 1, *supra.*

[5]The Tenth Circuit judges named in Smith's lawsuit are: Stephanie K. Seymour, Bobby R. Baldock, Wade Brorby, David Ebel, Mary Beck Briscoe, and Deanell Reece Tacha (as well as Tenth Circuit Clerk Patrick J. Fisher, Jr.), all of whom are being sued individually and in their official capacities. *See Smith v. Seymour*, No. 05-1032 (10th Cir., filed Jan. 1, 2005). Smith's official-capacity suit implicates the United States Court of Appeals for the Tenth Circuit as an entity. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects

Under all the circumstances, it is reasonably questionable whether the judges of the Tenth Circuit can be fair and impartial decision-makers in this appeal. Therefore, the panel's decision denying Smith's motion and supplemental motion to recuse and/or disqualify the Tenth Circuit from this appeal is clearly erroneous and contrary to law.

In addition to conflicting with a decision of the United States Supreme Court, the panel decision conflicts with the authoritative decisions of other United States Courts of Appeal that have addressed the foregoing issues. The panel decision conflicts with 28 U.S.C. § 455(a) and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The panel decision conflicts with Canon 3 of the Code of Judicial Conduct.

---

other than name, to be treated as a suit against the entity," citing *Brandon v. Holt*, 469 U.S. 464, 471-472 (1985)). Smith's motion to recuse and/or disqualify the Tenth Circuit from his currently pending appeal of the dismissal of his lawsuit is currently pending before the Tenth Circuit.

III.
PANEL DECISION AFFIRMING TAX COURT'S CASE DISMISSAL/SANCTION AGAINST SMITH FOR HIS ALLEGED FAILURE TO PROPERLY PROSECUTE, AND ENTRY OF A JUDGMENT BY DEFAULT AGAINST SMITH FOR MORE THAN $438,000.00

In its Order and Judgment, the panel affirmed a judgment of the United States Tax Court (Judge Joel Gerber) summarily denying Smith's motions for leave to vacate or revise Judge Gerber's previous orders dismissing Smith's tax cases as a sanction for Smith's alleged failure to properly prosecute. Judge Gerber entered a judgment by default against Smith in favor of the Commissioner of Internal Revenue for tax, penalties and interest of more than $438,000.00. No due process evidentiary hearing was held before Smith's tax cases were dismissed and a default judgment was entered, and no due process evidentiary hearing was held before Smith's motions for leave to vacate or revise Judge Gerber's previous orders were denied.[6]

---

[6]The source for Smith's right to a due process evidentiary hearing is the Due Process Clause of the Fifth Amendment to the Constitution of the United States. *See also* Canon 3(B)(8) of the Code of Judicial Conduct providing as follows: "[a] judge

Although the panel concedes that the Tax Court had jurisdiction over Smith's motions to vacate or revise Judge Gerber's previous orders,[7] the panel did not consider whether Judge Gerber abused his discretion and/or committed reversible error by failing to hold an evidentiary hearing on Smith's claim that Judge Gerber's previous orders were the result of a

---

shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."

[7]In reliance on *Davenport Recycling Assocs. v. Comm'r*, 220 F.3d 1255 (11th Cir. 2000), *Drobny v. Comm'r*, 113 F.3d 670 (7th Cir. 1997) and *Billingsley v. Comm'r*, 868 F.2d 1081 (9th Cir. 1989), the panel properly determined that the tax court had jurisdiction over Smith's motions to vacate or revise Judge Gerber's orders. *Davenport, Drobny* and *Billingsley* stand for the proposition that the tax court lacks jurisdiction over a decision once it becomes final except that the tax court retains jurisdiction ". . .to entertain such motions [motions to vacate] at any time, where the decision was obtained by fraud on the court." *Billingsley, supra*, at 1085, citing *Abatti v. Comm'r*, 859 F.2d 115, 117 (9th Cir. 1988). *See also, Toscano v. Comm'r.*, 441 F.2d 930, 933 (9th Cir. 1971), holding that a decision obtained by fraud on the tax court is "not a decision at all" and, therefore, could be set aside at any time.

fraud on the court perpetrated by the Commissioner of Internal Revenue.

In *Drobny v. Comm'r*, 113 F.3d 670 (7th Cir. 1997), one of the cases cited by the panel in support of its decision, the petitioners filed their motion to vacate eight years after the tax court judgment had been entered; but, because the petitioners raised the issue of fraud on the court, the United States Court of Appeals for the Seventh Circuit held that the tax court properly determined that it had jurisdiction, and granted the petitioners an evidentiary hearing that lasted three days and included 12 witnesses and more than 200 exhibits.

Similarly, in *Dufresne v. Comm'r*, 26 F.3d 105 (9th Cir. 1994), the tax court initially refused to hold an evidentiary hearing on taxpayer's claim that IRS attorneys had perpetrated a fraud on the court; but the United States Court of Appeals for the Ninth Circuit, after considering the issue on appeal, remanded with instructions to hold an evidentiary hearing. Even after the mandated evidentiary hearing and the entry of extensive findings of fact, however, the tax court still was unwilling to find that a fraud had been perpetrated on the court–deciding instead that the IRS attorneys' course of conduct constituted harmless error because there had been no showing of prejudice to the taxpayers. Holding that "prejudice is not an element of fraud on the court," on appeal, the Ninth Circuit determined that the tax court's refusal to grant the

taxpayers' motion to vacate the judgment on the basis of fraud on the court constituted an abuse of discretion. *See Dixon v. Comm'r*, 316 F.3d 1041 (9th Cir. 2003), citing *Abatti v. Comm'r*, 859 F.2d 115, 117 (9th Cir. 1988) and *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960).

Under the foregoing cases, Judge Gerber clearly abused his discretion and/or committed reversible error by failing to hold a due process evidentiary hearing on Smith's claim that Judge Gerber's previous orders were the result of a fraud on the court perpetrated by the Commissioner of Internal Revenue. *See Schrier v. Univ. of Colo.*, 427 D.3d 1253 (10th Cir. 2005), *citing Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202 (10th Cir. 2003) and *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163 (10th Cir. 1998). *See also, Davenport Recycling Assocs. v. Comm'r*, 220 F.3d 1255 (11th Cir. 2000). When this failure is considered in the light of Judge Gerber's previous failure to hold a due process evidentiary hearing before dismissing Smith's tax cases as a sanction for his alleged failure to properly prosecute, and entering a default judgment against Smith for more than $438,000.00, it is absolutely clear that Judge Gerber abused his discretion and/or committed reversible error under the

standard of review set forth in *Schrier, supra.*[8] The panel clearly misapplied the standard of review set forth in *Schrier* by holding that Judge Gerber did not abuse his discretion and/or commit reversible error.

In addition to conflicting with the authoritative decisions of other United States Courts of Appeal that have addressed the foregoing issues, the panel decision conflicts with a decision of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. The panel decision also conflicts with the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

---

[8]In *Schrier*, the United States Court of Appeals for the Tenth Circuit articulated the standard of review for abuse of discretion (on a motion for preliminary injunction) as requiring a showing ". . . that the district court committed an error of law (for example by applying the wrong legal standard) or committed clear error in its factual findings." The Tenth Circuit also described abuse of discretion as "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *See also, Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999).

IV.
PANEL DECISION IMPOSING SANCTIONS OF $6,000.00 AGAINST SMITH AND HIS ATTORNEY, HOOK , FOR FILING AN ALLEGED FRIVOLOUS APPEAL

The panel imposed sanctions of $6,000.00 against Smith and his attorney, M. Julia Hook, in favor of the Commissioner of Internal Revenue, for filing an alleged frivolous appeal, citing *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987) and Fed. R. App. P. 38.[9] The panel said:

> An unvarnished recitation of the steps leading to Mr. Smith's appeal demonstrates its frivolousness. He and Ms. Hook were co-petitioners in the dismissed Tax Court cases. Only Ms. Hook timely appealed the dismissals. In Ms. Hook's appeal, this court summarily affirmed the Tax Court's actions. *Hook*, 103 Fed. Appx. at 664. Mr. Smith then

---

[9]Fed. R. App. P. 38 provides as follows: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

> asked the Tax Court for leave to vacate or revise its just-affirmed decisions. The Tax Court denied his motions. Mr. Smith, represented by Ms. Hook, appealed to this court.

However, assuming *arguendo* that the Tenth Circuit was correct in summarily affirming Judge Gerber's actions, Smith was not precluded from asking Judge Gerber for leave to vacate or revise his just-affirmed decisions.

Smith was precluded from filing his own appeal of Judge Gerber's actions by the Tenth Circuit's decision in *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998) (*en banc*) (*sua sponte* imposition of prospective filing restrictions against Smith). In her appeal of Judge Gerber's actions, Hook did not raise the issue of whether Judge Gerber's orders dismissing Smith's tax cases were the result of a fraud perpetrated on the Tax Court by the Commissioner of Internal Revenue, or whether this issue could be resolved in the absence of a due process evidentiary hearing.

Smith raised these issues for the first time in his motions for leave to vacate or revise Judge Gerber's previous orders dismissing Smith's tax cases as a sanction for Smith's alleged failure to properly prosecute, and entering a default judgment against

Smith for more than $438,000.00. No due process evidentiary hearing was held before Smith's tax cases were dismissed and a default judgment was entered, and no due process evidentiary hearing was held before Smith's motions for leave to vacate or revise Judge Gerber's previous orders were denied. Under these circumstances, Smith's appeal was not repetitive of issues previously raised by Hook in her appeal and was not otherwise "frivolous" under Fed. R. App. P. 38. *See Braley, supra.*[10] Alternatively, the definition of the term "frivolous" set forth in *Braley* is so vague and indefinite that the panel's application of it to Smith in this appeal deprived him of his Fifth Amendment right to due process of law. In either case, the panel abused its discretion and/or committed reversible error by imposing sanctions against Smith for filing a "frivolous" appeal.

The panel decision conflicts with a decision of

---

[10]In *Braley*, the United States Court of Appeals for the Tenth Circuit defined a "frivolous" appeal as one where " . . . the result is obvious, or the appellant's arguments of error are wholly without merit." *See Id.* at 1510, citing *Taylor v. Sentry Life Insurance Co.*, 729 F.2d 652, 656 (9th Cir. 1984) (citations omitted).

the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. The panel decision conflicts with Fed. R. App. P. 38 and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

V.
CONCLUSION

As relief, Smith requests an order granting his Petition for Rehearing and Petition for Rehearing En Banc. If, on rehearing, the panel or the en banc court grants his motion to recuse and/or disqualify the court, Smith requests this appeal to be transferred to another United States Court of Appeals for re-submission on the merits. Smith requests any decision by the panel or the en banc court to be designated for publication. *See* 10th Cir. R. 36.2.

Dated this 20th day of January, 2006.

Respectfully submitted,

M. JULIA HOOK

5800 East Sixth Avenue Parkway
Denver, Colorado 80220
303-321-7403
mjhook@comcast.net

ATTORNEY FOR APPELLANT
DAVID LEE SMITH

CERTIFICATE OF SERVICE AND CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that on this 20th day of January, 2006, a true and correct copy of the foregoing pleading was placed in the United States mail, first class postage prepaid, addressed to:

Marion E. M. Erickson, Attorney
Appellate Section
Tax Division
United States Department of Justice
P.O. Box 502
Washington, D.C. 20044
[Marion.E.M.Erickson@usdoj.gov]

and that a copy of the pleading in pdf format was sent to the Clerk of the Tenth Circuit at esubmission@ca10.uscourts.gov, and to opposing counsel at the email address shown above.

I also hereby certify that: (1) all required privacy redactions (none required) have been made to the pleading, and, with the exception of those redactions, the document submitted in scanned pdf format is an exact copy of the written document filed with the Clerk (except for the insertion of digital signatures); and (2) the digital submission has been scanned for viruses with Version 10.0.27 of McAfee VirusScan, which was updated on January 18, 2006, and, according to the program, is free of viruses.